

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

GREGORY P. KEITH,

Petitioner,

v.

BARRY D. DAVIS,

Respondent,

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Civil No. 2:09-CV-14133

HONORABLE PAUL D. BORMAN  
UNITED STATES DISTRICT JUDGE

**OPINION AND ORDER HOLDING IN ABEYANCE THE PETITION FOR WRIT OF  
HABEAS CORPUS AND ADMINISTRATIVELY CLOSING THE CASE.**

Gregory P. Keith, (“Petitioner”), confined at the Gus Harrison Correctional Facility in Adrian, Michigan, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his *pro se* application, petitioner challenges his conviction for one count of assault with intent to commit first-degree criminal sexual conduct, M.C.L.A. 750.520g(1); and two counts of assault with intent to commit second-degree criminal sexual conduct, M.C.L.A. 750.520g(2). Petitioner has now filed a motion to hold the petition in abeyance to permit him to file a second post-conviction motion in the state courts to raise additional claims that are not included in the current petition. For the reasons stated below, the Court will hold the petition in abeyance and will stay the proceedings under the terms outlined below in the opinion to permit petitioner to return to the state courts to exhaust his additional claims, failing which the petition shall be dismissed without prejudice. The Court will also administratively close the case.

**I. Background**

Petitioner was convicted by a jury in the Oakland County Circuit Court. Petitioner’s

conviction was affirmed on appeal. *People v. Keith*, No. 252187 (Mich.Ct.App. July 28, 2005); *lv. den.* 474 Mich. 977; 707 N.W. 2d 200 (2005). Petitioner then filed a post-conviction motion for relief from judgment pursuant to M.C.R. 6.500, *et. seq.*, with the Oakland County Circuit Court, which was denied. *People v. Keith*, No. 03-190080-FH (Oakland County Circuit Court, March 13, 2007). The Michigan appellate courts denied petitioner leave to appeal the denial of his post-conviction motion. *People v. Keith*, No. 284052 (Mich.Ct.App. October 10, 2008); *lv. den.* 483 Mich. 1017; 765 N.W. 2d 306 (2009).

On October 20, 2009, petitioner filed his petition for writ of habeas corpus, in which he seeks habeas relief on four claims. Petitioner has now filed a motion to hold the habeas petition in abeyance so that he can return to the Oakland County Circuit Court to exhaust two new claims which he alleges are based on newly discovered evidence.

## **II. Discussion**

A federal district court has authority to abate or dismiss a federal habeas action pending resolution of state post-conviction proceedings. *See Brewer v. Johnson*, 139 F. 3d 491, 493 (5<sup>th</sup> Cir. 1998). However, to stay federal proceedings and hold a habeas petition in abeyance pending resolution of state court proceedings, there must be exceptional or unusual circumstances. *Sitto v. Bock*, 207 F. Supp. 2d 668, 676 (E.D. Mich. 2002); *Hudson v. Martin*, 68 F. Supp. 2d 798, 800 (E.D. Mich. 1999). A federal district court is authorized to stay fully exhausted federal habeas petitions pending the exhaustion of other claims in the state courts. *See Nowaczyk v. Warden, New Hampshire State Prison*, 299 F.3d 69, 77-79 (1<sup>st</sup> Cir. 2002)(holding that district courts should “take seriously any request for a stay.”); *Anthony v. Cambra*, 236 F. 3d 568, 575 (9<sup>th</sup> Cir. 2000); *Moritz v. Lafler*, No. 2008 WL 783751 (E.D. Mich. March 19, 2008); *Tran v. Bell*, 145 F.

Supp. 2d 939, 941-42 (W.D. Tenn. 2001); *Hill v. Mitchell*, 30 F. Supp. 2d 997, 1000 (S.D. Ohio 1998).

The Court will grant petitioner's motion to hold the petition in abeyance while he returns to the state courts to exhaust his additional claims. The outright dismissal of the petition, albeit without prejudice, might result in preclusion of consideration of the petitioner's claims in this Court due to the expiration of the AEDPA's one year statute of limitations. *See* 28 U.S.C. § 2244(d)(1). A common circumstance calling for abating a habeas petition arises when the original petition was timely filed, as was the case here, but a second, exhausted habeas petition would be time barred by the AEDPA's statute of limitations. *See Hargrove v. Brigano*, 300 F. 3d 717, 720-21 (6<sup>th</sup> Cir. 2002). The U.S. Supreme Court, in fact, has suggested that a habeas petitioner who is concerned about the possible effects of his state post-conviction filings on the AEDPA's statute of limitations could file a "protective" petition in federal court and then ask for the petition to be held in abeyance pending the exhaustion of state post-conviction remedies. *See Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005) (citing *Rhines v. Weber*, 544 U.S. 269 (2005)). A federal court may stay a federal habeas petition and hold further proceedings in abeyance pending resolution of state court post-conviction proceedings, provided there is good cause for failure to exhaust claims and that the unexhausted claims are not "plainly meritless." *Rhines*, 544 U.S. at 278.

The Court is aware that pursuant to M.C.R. 6.502(G)(1), a criminal defendant in Michigan can typically file only one motion for relief from judgment with regard to a criminal conviction. *See Banks v. Jackson*, 149 Fed. Appx. 414, 418 (6<sup>th</sup> Cir. 2005); *Hudson v. Martin*, 68 F. Supp. 2d at 800 (citing to *People v. Ambrose*, 459 Mich. 884; 587 N. W. 2d 282 (1998)).

However, M.C.R. 6.502(G)(2) states that a defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion. *Banks*, 149 Fed. Appx. at 418; *Hudson*, 68 F. Supp. 2d at 800-01. Petitioner alleges in his motion that he has newly discovered evidence in support of the claims that he wishes to raise in his second motion for relief from judgment. Because there is some likelihood that the Michigan courts might permit petitioner to file a second post-conviction motion for relief from judgment pursuant to the newly discovered evidence exception contained in M.C.R. 6.502(G)(2), a procedural bar to petitioner filing such a second motion is not clearly applicable; therefore, this Court should grant petitioner a stay of proceedings to permit him to attempt to exhaust the claims contained in his second motion for relief from judgment with the state courts. *See Banks*, 149 Fed. Appx. at 419-20.

When a district court determines that a stay is appropriate pending exhaustion of state court remedies, the district court “should place reasonable time limits on a petitioner’s trip to state court and back.” *Rhines*, 544 U.S. at 278. To ensure that petitioner does not delay in exhausting his state court remedies, the Court imposes upon petitioner time limits within which she must proceed. *See Palmer v. Carlton*, 276 F.3d 777, 781 (6<sup>th</sup> Cir. 2002). Petitioner must present his claims in state court within sixty (60) days from the date of this Order. *See id.* Further, he must ask this Court to lift the stay within sixty (60) days of exhausting his state court remedies. *See id.* “If the conditions of the stay are not met, the stay may later be vacated *nunc pro tunc* as of the date the stay was entered, and the petition may be dismissed.” *Palmer*, 276 F. 3d at 781 (internal quotation omitted).

### III. ORDER

Accordingly, **IT IS ORDERED** that that petitioner may file a second motion for relief from judgment with the state court within sixty (60) days of receipt of this Court's order. If petitioner fails to file a motion for relief from judgment with the state courts by that date, the Court will dismiss the present petition without prejudice.

If petitioner files a motion for relief from judgment, he shall notify this Court that such motion papers have been filed in state court. The case shall then be held in abeyance pending the petitioner's exhaustion of the claim or claims. The petitioner shall re-file his habeas petition within 60 days after the conclusion of the state court post-conviction proceedings. Petitioner is free at that time to file an amended habeas petition which contains any newly exhausted claims. This tolling is conditioned upon petitioner re-filing his habeas petition under the current caption and case number within **sixty (60) days** after the conclusion of the state court post-conviction proceedings.

To avoid administrative difficulties, the Court **ORDERS** the Clerk of Court to **CLOSE** this case for statistical purposes only. Nothing in this order or in the related docket entry shall be considered a dismissal or disposition of this matter. *See Sitto*, 207 F. Supp. 2d at 677.

It is further **ORDERED** that upon receipt of a motion to reinstate the habeas petition following exhaustion of state remedies, the Court may order the Clerk to reopen this case for statistical purposes.

**SO ORDERED.**

S/Paul D. Borman  
PAUL D. BORMAN  
UNITED STATES DISTRICT JUDGE

Dated: December 21, 2010

CERTIFICATE OF SERVICE

Copies of this Order were served on the attorneys of record by electronic means or U.S. Mail on December 21, 2010.

S/Denise Goodine

Case Manager